(3)

Supreme Court, U.S.
FILED
APR 6 - 1995
CLERK

No. 94-1363

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.,

Petitioner,

v.

ALVORD-POLK, INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

REPLY BRIEF FOR PETITIONER

RICHARD D. LAGESON
Counsel of Record
ROBERT J. SELSOR
SUELTHAUS & WALSH, P.C.
7733 Forsyth Blvd.
St. Louis, Missouri 63105
(314) 727-7676

Counsel for Petitioner
The National Decorating Products Association, Inc.

BEST AVAILABLE COPY

15 pp

TABLE OF CONTENTS

Table Of Authorities iii

I. This Court Must Resolve The Conflict Among The Courts of Appeals On the Question Whether A Conspiracy May Be Inferred From Circumstantial Evidence That The Stated Reason For A Manufacturer's Distribution Policy Is Allegedly Pretextual 2

1. Respondents' Brief In Opposition Misinterprets The Opinion of the Third Circuit 2

a. The Court of Appeals Did Not Reject Summary Judgment Because of Direct Evidence of Conspiracy 3

b. Respondents' Circumstantial Evidence Amounts to Nothing More Than Dealer Complaints Along with Evidence Supporting an Inference of Pretext 5

2. Respondents Have Not Refuted the Existence of a Conflict in the Courts of Appeals 6

II. The Decision Below Contravenes And Improperly Extends The *Hydrolevel* Decision By Eviscerating The Requirement Of Concerted Action In A Section 1 Case. 8

Conclusion 10

TABLE OF AUTHORITIES

CASES

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.,
456 U.S. 556 (1982) 8-10

Bruce Drug, Inc. v. Hollister, Inc.,
688 F.2d 853 (1st Cir. 1982) 7

Garment Dist. Inc. v. Belk Store Services, Inc.,
799 F.2d 905 (4th Cir. 1986), *cert. denied*,
486 U.S. 1005 (1988) 7

H.L. Hayden Co. v. Siemens Medical Systems, Inc.,
879 F.2d 1005 (2d Cir. 1989) 7

H.L. Moore Drug Exchange v. Eli Lilly & Co.,
662 F.2d 935 (2d Cir. 1981), *cert. denied*,
459 U.S. 880 (1982) 7

Lovett v. General Motors Corp.,
998 F.2d 575 (8th Cir. 1993), *cert. denied*,
114 S.Ct. 1058 (1994) 7-8

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 4

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) . . . . . *passim*

Venture Technology, Inc. v. National Fuel Gas Co., 685 F.2d 41 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982) 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-1363

THE NATIONAL DECORATING PRODUCTS ASSOCIATION, INC.,
Petitioner,

v.

ALVORD-POLK, INC., *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

The petition for a writ of certiorari outlines the compelling reasons why this Court should consider and review this case. This case involves an important and frequently recurring question under Section 1 of the Sherman Act, resolution of which has led to disparate results involving eight courts of appeals; the decision below turns entirely on the legal question whether evidence of pretext alone permits an inference of conspiracy; and the

case below contravenes and improperly extends this Court's precedents.

I. This Court Must Resolve The Conflict Among The Courts Of Appeals On The Question Whether A Conspiracy May Be Inferred From Circumstantial Evidence That The Stated Reason For A Manufacturer's Distribution Policy Is Allegedly Pretextual.

1. Respondents' brief in opposition misinterprets the opinion of the Third Circuit. The court of appeals (in both its initial opinion and its diametrically opposed opinion on rehearing) recognized that *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), requires "something more" than dealer complaints before an antitrust conspiracy may be inferred from circumstantial evidence. The Third Circuit specified the items of circumstantial evidence at issue in this case. These items consisted of evidence that: (1) Defendant Schumacher received complaints from conventional retailers regarding 800 number dealers, and following the receipt of these complaints took actions to curb 800 number free riding (Pet. App. A17, A34); (2) there were "inconsistencies in and contrasts between the internal and the public explanations of the drop shipment policy" (*id.* at A39); and, (3) Schumacher did not use mathematical calculations based on cost data to set the level of its drop shipment surcharge (*id.*).

Respondents misinterpret the opinion below in two ways. First, they contend that the Third Circuit reversed summary judgment on Count II because the record contained "direct" evidence of conspiracy. That contention is flatly contradicted by the opinion itself and by the record. It is merely an attempt to circumvent the *Monsanto* standards for circumstantial evidence by relabeling dealer complaints as "direct" evidence. *Monsanto* does not permit that result.

Second, respondents contend that dealer complaints may themselves constitute the "something more" *Monsanto* requires. That contention is wholly tautological. It is also directly contrary to *Monsanto*, which held that "*something more*" than dealer complaints is needed to infer a conspiracy. The Third Circuit held that circumstantial evidence of pretext can constitute "something more." Respondents now seek to invert that analysis by labeling dealer complaints as the "something more" that is added to evidence of pretext. Even if respondents' revisions had merit, there would still be a clear need for this Court to resolve the conflict that exists on an important legal issue with great practical impact.

a. The court of appeals did not reject summary judgment because of direct evidence of conspiracy. Respondents claim that *Monsanto's* "something more" requirement is met in this case by "strong evidence of coercion by the NDPA, including threatened boycotts. App., A28."

Br. in Opp. 17. But the decision below is expressly premised on the absence of any direct evidence of a conspiracy between petitioner and Schumacher. The Third Circuit spent nearly two years determining whether the circumstantial evidence was sufficient to support an inference of conspiracy; indeed, it initially held that the circumstantial evidence was *not* sufficient. The court of appeals would not have undertaken that inquiry had it concluded -- as respondents suggest -- that direct evidence of conspiracy precluded summary judgment.

The Third Circuit's analysis of Count II, in both of its opinions, focused solely on the application of the rule set forth in *Monsanto, viz.*, that in order to infer a conspiracy from ambiguous circumstantial evidence, antitrust plaintiffs must present evidence that tends to exclude the possibility that the defendant was acting independently. 465 U.S. at 764; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). This analysis of circumstantial evidence would have been wholly unnecessary had the record contained any direct evidence of conspiracy. Respondents' total retreat from the stated terms of the decision below confirms the error of the legal standard employed by the Third Circuit and spotlights the need for this Court's review.

Contrary to respondents' assertion (*see e.g.*, Br. in Opp. 17-18), the court below did not state

and the record does not contain evidence that Schumacher was threatened with a dealer boycott and capitulated to that threat. What respondents characterize as "direct" evidence of conspiracy amounts to nothing more than evidence of dealer complaints and actions by Schumacher in response to those complaints -- the very type of ambiguous *circumstantial* evidence that *Monsanto* declared could not, as a matter of law, support an inference of conspiracy absent "something more." *Monsanto*, 465 U.S. at 763-764. If, as respondents assert, the Third Circuit had held that evidence of Schumacher's action in response to dealer complaints constitutes "direct" evidence of conspiracy, such a holding would be so clearly at odds with *Monsanto* that this case would be a suitable candidate for summary reversal.

b. Respondents' circumstantial evidence amounts to nothing more than dealer complaints along with evidence supporting an inference of pretext. Respondents further misinterpret the decision below by asserting that the record contains more than evidence of alleged pretext, and that it also contains evidence of complaints and Schumacher's actions in response to those complaints. Br. in Opp. 17-18. Respondents characterize as dealer "pressure," or "coercion," precisely the sort of conduct which *Monsanto* denominated as dealer complaints. Contrary to respondents' restatement of the case, the Third Circuit correctly viewed these dealer complaints as ambiguous circumstantial evidence and, hence,

searched for the "something more" that *Monsanto* requires. In conflict with other courts of appeals, however, the Third Circuit held that alleged pretext is sufficient to bridge the evidentiary gap left by dealer complaints.

*2. **Respondents have not refuted the existence of a conflict in the courts of appeals.*** Respondents concede that at least five other courts of appeals have held that circumstantial evidence of pretext does not tend to exclude independent action and thus cannot support an inference of antitrust conspiracy. Br. in Opp. 12-13. Respondents seek to avoid this clear conflict by suggesting that the Third Circuit relied on more than just pretext to tend to exclude the possibility of independent action because it also relied on dealer complaints. That formulation merely restates the conflict, it does not dispel the clear split in authority. The only evidence relied upon by the court below to support a finding of conspiracy, other than evidence of pretext, was complaint evidence -- the very type of ambiguous circumstantial evidence that *Monsanto* directs must trigger the search for "something more." In holding that ambiguous circumstantial evidence of pretext, in combination with evidence of dealer complaints and manufacturer response, is sufficient to permit an inference of conspiracy the Third Circuit is directly

in conflict with decisions of the First, Second, Fourth, Seventh, and Eighth Circuits.[1]

Significantly, respondents fail to distinguish the Eighth Circuit's decision in *Lovett*. Focusing on the fact that the *Lovett* opinion does not actually use the term "pretext", respondents avoid the significance of the parallel between the Eighth

---

1

Respondents contend that the First, Second, Fourth, Seventh, and Eighth Circuits hold that "while evidence of pretext may be probative of a Section 1 conspiracy, it will not, standing alone, create an inference that a conspiracy exists" -- thereby suggesting those cases lack the kind of dealer complaint evidence present here. Br. in Opp. 12. Respondents are incorrect. The following cases also include evidence of dealer complaints: *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853, 855-56 (1st Cir. 1982); *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1009-10 (2d Cir. 1989); *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 47 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982); *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941-42 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Garment Dist. Inc. v. Belk Store Services, Inc.*, 799 F.2d 905, 907 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Lovett v. General Motors Corp.*, 998 F.2d 575, 577 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1058 (1994). Thus, evidence of the dealer complaints in this case is not a distinguishing factor.

Circuit case and this case. In fact, GM's "less than honest" reason proffered for cutting plaintiff's allocation of automobiles is precisely the type of allegedly pretextual evidence at issue in this case. *Id.* at 580.

For these reasons, and those set forth in the petition, it is clear that the existing conflict presents a question that is significant and recurring and plainly warrants this Court's review.

II. The Decision Below Contravenes And Improperly Extends The *Hydrolevel* Decision By Eviscerating The Requirement Of Concerted Action In A Section 1 Case.

As explained by the petition, the decision of the Third Circuit has extended this Court's ruling in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) far beyond its moorings. By concluding that the unilateral actions of a sole actor can subject a trade association to antitrust conspiracy liability as though the association itself acted as a group, the opinion below eviscerates the essential requirement that Section 1 liability depends on the existence of an agreement or concerted action between two or more actors. The Third Circuit's abrupt departure from settled precedent cannot be squared with the *Hydrolevel* majority's far more narrow ruling, realizing the worst fears of those dissenting in *Hydrolevel*, and independently warranting this Court's plenary review.

Respondents acknowledge and embrace the lower court's dramatic extension of this Court's ruling in *Hydrolevel*. They concede (Br. in Opp. 26) that "[t]he concerted action requirement of Section 1 *** is merely met in a different way than it was met in the *Hydrolevel* case." They embrace the radical proposition, upon which the lower court's judgment is based, that "for antitrust purposes, there is no difference between Petit urging manufacturers to eliminate 800-number dealers (and threatening a boycott if they did not), and all 3,300 NDPA members doing the same thing in unison." Br. in Opp. 27.

There is simply no merit to the bare assertion that "[i]n order to hold a trade association liable, all that is needed is the action of an agent in that trade association acting with apparent authority." Br. in Opp. 21. There must also be *concerted action.* Petit did not have apparent authority, but even more fundamentally, respondents' error lies in their mistaken assumption that the *test for apparent authority is the same as the test for concerted action.* They are not. They are two distinct inquiries. Were the rule otherwise, the activities of one unauthorized agent of a trade association would, standing alone, constitute concerted group action. Such a result is clearly unreasonable.

Hydrolevel involved at least two conspirators in addition to the trade association that was alleged to be part of the conspiracy. In contrast, NDPA is charged with conspiring *with*

itself, through an "apparent agent." *Hydrolevel's* apparent authority rationale simply does not fit the instant case, as respondents implicitly concede by retreating to a fleeting discussion of a "ratification" theory. Br. in Opp. 23-24.

The court of appeals has so lowered a Section 1 plaintiff's required threshold showing of concerted action as virtually to eviscerate that fundamental element of the offense. Allowing suits like this one to proceed will severely chill trade association performance of essential economic functions such as reducing the transaction and information costs faced by retailers and consumers alike.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

RICHARD D. LAGESON
Counsel of Record
ROBERT J. SELSOR
SUELTHAUS & WALSH, P.C.
7733 Forsyth Blvd.
St. Louis, Missouri 63105
(314) 727-7676

April 1995 Counsel for Petitioner
The National Decorating Products Association, Inc.